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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF SECRETARY

May 30, 1997

Mr. William F. Caton  
Acting Secretary  
Federal Communications Commission  
Washington, D.C. 20554


Re: Reply Comments to  
Metro Broadcasters-Texas, Inc.'s  
Comments and Counterproposal  
concerning Amendment of Section 73.202(b),  
FM Table of Allotments  
MM Docket No. 97-26; RM-9090; RM-8989; RM-8968  
(Detroit, Texas)

Dear Mr. Caton:

Transmitted herewith on behalf of K95.5, Inc. is an original and four copies of its reply comments to Metro Broadcasters-Texas, Inc.'s Comments and Counterproposal concerning the above-referenced allotment proceeding.

Should any questions arise concerning this matter, please contact this office directly.

Sincerely,

  
John F. Garziglia  
Patricia M. Chuh

Enclosure

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Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

MAY 30 1997

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF SECRETARY

In the Matter of )

DOCKET FILE COPY ORIGINAL

Amendment of Section 73.202(b), ) MM Docket No. 97-26  
Table of Allotments, ) RM-9090  
FM Broadcast Stations. ) RM-9089  
(Detroit, Texas) ) RM-8968

To: Chief, Allocations Branch

REPLY COMMENTS TO COUNTERPROPOSAL

K95.5, Inc., by its attorneys, hereby respectfully submits its reply comments in response to Metro Broadcasters-Texas, Inc.'s ("Metro") counterproposal filed on March 17, 1997 in the above-referenced allotment proceeding.<sup>1/</sup> In response thereto, the following is submitted:

1. In its counterproposal, Metro proposed to (1) allot Channel 238C2, 238C3, or 238A to Detroit, Texas, (2) substitute Channel 294C2 for Channel 238C2 at Hugo, Oklahoma, and (3) modify the license of KHYI to specify operation on Channel 237C2 instead

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<sup>1/</sup> The Commission instituted the above-referenced proceeding as a result of a petition for rule making filed by Great Plains Radiocasting requesting the allotment of Channel 294C2 to Detroit, Texas to provide that community with its first local aural transmission service. On January 24, 1997, the Commission released a Notice of Proposed Rule Making ("NPRM") seeking comment on the proposed allotment. The NPRM established March 17, 1997 as the deadline for interested parties to file comments and April 1, 1997 as the deadline for filing reply comments. On March 17, 1997, K95.5, Inc. ("K95.5") filed a counterproposal to allot Channel 294C2 to Antlers, Oklahoma. Metro also filed its comments and counterproposal on March 17, 1997. By Public Notice Report No. 2197, released May 15, 1997, the Commission established May 30, 1997 as the deadline for filing reply comments to the counterproposals. Therefore, K95.5, Inc.'s instant Reply Comments to Counterproposal are timely filed.

of Channel 237C3. Because Metro's counterproposal is fatally defective and conflicts with K95.5, Inc.'s properly filed counterproposal to allot Channel 294C2 to Antlers, Oklahoma, and a timely filed proposal to allot Channel 237A to Jacksboro, Texas in MM Docket No. 97-91 (Lewisville, Gainesville, Robinson, Corsicana, Jacksboro, and Mineral Wells, Texas), the Commission should dismiss Metro's counterproposal. Therefore, no comparison between the timely filed proposal to allot Channel 294C2 to Antlers, Oklahoma, the timely filed proposal to allot Channel 237A to Jacksboro, Texas, or the defective counterproposal filed by Metro, is necessary.<sup>2/</sup>

2. Metro's counterproposal is fatally defective because Metro failed to include a reimbursement statement as to its proposed channel change for KITX(FM) in its counterproposal.<sup>3/</sup>

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<sup>2/</sup> Even if a comparison was to be made, Commission precedent would favor the allotment of Channel 294C2 to either Detroit, Texas or to Antlers, Oklahoma. Both of these proposed allotments provide for new service, which is preferred over an upgrade of existing service. See Bonita Springs, Cape Coral, Tampa, and Fort Myers Beach, Florida, 6 FCC Rcd 6966 (1991) ("Under normal circumstances, [the Commission] will favor a new service over the upgrading of an existing service"). It is noted that there is currently a vacant class A allotment on Channel 284A at Antlers, Oklahoma. That lower class channel has not been applied for and remains vacant. Therefore, the vacant channel does not represent any service to the community of Antlers. In any event, it has long been the Commission's policy that proponents for an upgrade in channel, which conflicts with a proposal for a new allotment, should demonstrate a preference under the allocation criteria by showing a need for the proposed increase in service. See Kilgore, Texas, 3 FCC Rcd 4840 (1988). Metro failed to submit such a comparison, either with respect to the Detroit proposal or with respect to the Antlers proposal.

<sup>3/</sup> See K95.5, Inc.'s Opposition to Metro's Motion for Leave to File Supplemental Comments filed on May 15, 1997 for a complete explanation and recitation of the facts on this issue (on

Contrary to Metro's assertions in its Reply to Opposition to Motion for Leave to File Supplemental Comments filed on May 22, 1997 ("Reply"), the Commission's policy on this issue is clear. In Punxsutawney, Pennsylvania, 3 FCC Rcd 5555, para. 9 (1988), the Commission unequivocally stated its policy regarding the content of competing expressions of interest. In that case, the Commission stated that where the proposed allotment requires an existing station to modify its operation by specifying a new channel, the party filing to change a station's channel must state its intention to reimburse the affected parties. Id. Further, the Commission stated that "[t]he absence of such a statement will render the expression of interest invalid." Id. Since an expression of interest must accompany all counter-proposals, an invalid expression of interest makes the counter-proposal defective. See also Naples, Florida, 10 FCC Rcd 6548, para. 9 (1995) (counterproposal dismissed for failure to make a reimbursement commitment in the counterproposal). Metro's counterproposal in this allotment proceeding did not contain such a reimbursement statement concerning the substitution of Channel 294C2 for 238C2 at Hugo, Oklahoma, even though K95.5, Inc. currently operates FM station KITX(FM) on Channel 238C2 at Hugo, Oklahoma. Metro's counterproposal is therefore fatally defective and the Commission should dismiss it from this proceeding.

3. In addition, Metro is misguided when it attempts to argue in its Reply that the Commission should allow Metro to cure  

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file with the Commission).

its defective counterproposal. Reply at 2. Metro cites Tioga, Pennsylvania, 7 FCC Rcd 7653 (1992)<sup>4/</sup> as support for its mistaken belief that the Commission allows counterproponents to cure deficiencies in counterproposals. However, Tioga, Pennsylvania has been subsequently overruled by Naples, Florida, 10 FCC Rcd 6548 (1995). In Naples, Florida, the counterproponents asserted that their counterproposal should not be dismissed because the omission of a reimbursement statement in their counterproposal was "unintentional, relatively minor and quickly corrected (emphasis added)." Id. However, the Commission completely rejected these assertions and affirmed the dismissal of the counterproposal for failure to make a reimbursement commitment. Id. The Commission stated that "[t]he reimbursement pledge is a fundamental component of any counterproposal and must be present or the counterproposal is deficient and must be dismissed." Id. Thus, there is absolutely no basis upon which Metro may seek to cure its fatally defective counterproposal in this allotment proceeding.

4. Further, even if Tioga, Pennsylvania had not been overruled, Metro still would not have a valid basis upon which to cure its defective counterproposal. The Commission in Tioga, Pennsylvania allowed a counterproponent in that proceeding to cure its counterproposal because the cured counterproposal did not require the denial of another proposal and there was no

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<sup>4/</sup> Metro cites Tioga, Pennsylvania as Boalsburg, Clearfield, et al., Pennsylvania.

prejudice to the licensee entitled to reimbursement. In that proceeding, the licensee entitled to reimbursement specifically cited to the counterproponent's counterproposal and solicited a conditional grant of its construction permit contingent upon the resulting allotments in that proceeding. 7 FCC Rcd 7653 at para. 8. However, allowing Metro to cure its defective counterproposal in this allotment proceeding, unlike the facts involved in the Tioga, Pennsylvania case, would require the denial of other proposals and cause prejudice to the licensee entitled to reimbursement.

5. A grant of Metro's counterproposal may require K95.5, Inc.'s timely and properly filed counterproposal to allot Channel 294C2 to Antlers, Oklahoma to be denied since Metro's defective counterproposal seeks to substitute Channel 294C2 for Channel 238C2 at Hugo, Oklahoma in order to upgrade its station KHYI. Further, a grant of Metro's counterproposal may also require the denial of a proposal in MM Docket No. 97-91 (Lewisville, Gainesville, Robinson, Corsicana, Jacksboro, and Mineral Wells, Texas). In MM Docket No. 97-91, Heftel Broadcasting Corporation ("Heftel"), seeks to substitute Channel 237A for existing Channel 299A at Jacksboro, Texas, among other allotment proposals. The acceptance and granting of Metro's defective counterproposal in this proceeding may require that Heftel's proposed MM Docket No. 97-91 allotment of Channel 237A instead of Channel 299A at Jacks-

boro, Texas be denied.<sup>5/</sup> Thus, contrary to Metro's assertions, allowing Metro to cure its defective counterproposal in this proceeding may require the denial of other proposals. Most significantly, if Metro's defective counterproposal in this proceeding is accepted, then the Commission must consider Heftel's proposed allotment of Channel 237A to Jacksboro, Texas in MM Docket No. 97-91 in this allotment proceeding since the proposed allotment of Channel 237A to Jacksboro, Texas would conflict with the proposed upgrade of KHYI(FM) to Channel 237C2.

6. Metro's defective counterproposal would also result in undue prejudice to K95.5, Inc., the licensee entitled to reimbursement. Contrary to the affected licensee in Tioga, Pennsylvania, K95.5, Inc. does not wish to operate on a different channel nor does it consent to such a switch. The substitution of its operating channel and frequency would unduly prejudice K95.5, Inc. In addition to being forced to switch operating channels against its will, K95.5, Inc. would also suffer irreparable damage to the goodwill and name recognition developed by the use of its corporate name "K95.5." Its corporate name signifies the importance of K95.5, Inc.'s operation on its existing channel and

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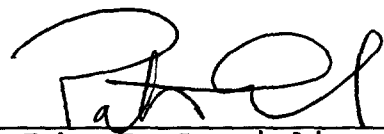
<sup>5/</sup> The Commission should consider Metro's Comments and Counterproposal filed on May 5, 1997 in MM Docket No. 97-91 as a late filed and therefore defective counterproposal in this proceeding. In its MM Docket No. 97-91 Comments and Counterproposal, Metro proposes to (1) allot Channel 238C2, 238C3, or 238A to Detroit, Texas, (2) modify the license of KHYI to specify operation on Channel 237C2 instead of Channel 237C3, (3) substitute Channel 294C2 for Channel 238C2 at Hugo, Oklahoma, and (4) maintain the current allotment of 299A at Jacksboro, Texas, which is the same proposal it already made in this proceeding.

frequency. Therefore, Tioga, Pennsylvania is not applicable in the instant case, even if it had not been overruled.

WHEREFORE, for the reasons stated above, K95.5, Inc. respectfully requests that the Commission dismiss Metro's defective counterproposal.

Respectfully submitted,

K95.5, INC.

By:   
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May 30, 1997



**CERTIFICATE OF SERVICE**

I, Lisa A. Skoritoski, a secretary in the law firm of Pepper & Corazzini, L.L.P., do hereby certify that on this 30th day of May, 1997, copies of the foregoing Opposition to Motion for Leave to File Supplemental Comments were mailed, postage prepaid, to the following:

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